BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service.	Rulemaking 95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995)

ADMINISTRATIVE LAW JUDGE'S RULING ON DISPUTED CONTRACT ISSUES

I. Introduction

This ruling resolves three disputed issues brought before the Commission in the "Motion for Dispute Resolution," filed by Pac-West Telecomm, Inc. (Pac-West) on September 21, 2004 (Motion). The disputed issues relate to Pac-West's interconnection agreement (ICA) with Verizon California, Inc. (Verizon) that was approved by the Commission on May 22, 2003. The disputed issues involve the data and calculations used by Verizon to ascertain the intercarrier compensation due to Pac-West under the ICA. Pac-West claims the disputed compensation payments amount to $3.49 million as of October 8, 2004.

Pac-West states that "despite extensive discussions and negotiations," the parties have been unable to resolve these disputes. Accordingly, Pac-West seeks a ruling on the substantive merits of the disputes by an Administrative Law

Judge (ALJ) Ruling pursuant to Section 14.2 of the ICA and Section III (D) of Decision (D.) 95-12-056, as incorporated into the ICA, which states:

> "If mediation fails, the ALJ will direct parties to submit short pleadings and issue a written ruling to resolve the dispute. The ALJ shall use our adopted preferred outcomes as guidance under which disputes will be reviewed and resolved. If a party objects to the ALJ's ruling, it may then file a formal complaint under the Commission's expedited process described below."

Verizon filed a response to the Motion on October 6, 2004. While Verizon disputes Pac-West's substantive position on each issue, Verizon agrees to bypass mediation and commence briefing to obtain an ALJ ruling on the merits.

An ALJ ruling dated December 17, 2004, set a briefing schedule to address each of the issues in dispute. Opening briefs were filed on January 10, 2005, with reply briefs filed on January 28, 2005. As requested by Pac-West, this ruling sets forth the ALJ's opinion on the merits of parties' arguments on each of the disputed issues. This ruling decides in favor of Verizon on Issues 1 and 3, and decides in favor of Pac-West on Issue 2. As noted above, if either party seeks to continue litigating these issues, its recourse is to file a formal complaint under the Commission's expedited process.

II. Disposition of Disputed Issues

A. Issue 1: Is traffic exchanged from January 1 through May 22, 2003 relevant in calculating the point at which the volume cap is reached for the 2003 under the ICA?

1. Background

This dispute relates to the calculation of allowable traffic terminated during 2003 for which reciprocal compensation is due. Included in such traffic

are calls locally dialed by Verizon customers bound for Pac-West customers which are Internet Service Providers (ISPs).

The ICA provides for the payment of reciprocal compensation for the termination of ISP-bound traffic in accordance with provisions of the Federal Communications Commission (FCC) "Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP Bound Traffic*, FCC 01-131, CC Docket Nos. 96-98 and 99-68, adopted April 18, 2001 (referred to herein as the "*FCC Internet Order*").

The *FCC Internet Order* established a transitional regime to phase out the previously existing system whereby reciprocal compensation applied to ISP-Bound Traffic. Specifically, the FCC imposed caps on the per-minute rates payable on such traffic, declining toward zero over 36-months from the effective date of the *Order*. The FCC also capped the volume of traffic minutes subject to reciprocal compensation in order to ensure that growth in dial-up Internet access did not undermine the FCC's intent to transition away from such compensation. The FCC referred to this limitation on allowable minutes as "Growth Caps."

The parties' entered into the May 23, 2003 ICA in conformance with the provisions of the *FCC Internet Order*. Accordingly, the ICA requires the payment of reciprocal compensation for the termination of local dial-up traffic only up to the point where the applicable "Growth Cap" is reached. Under the ICA, traffic in excess of the capped number of minutes of compensable ISP-Bound traffic is exchanged on a bill-and-keep basis, and is not subject to reciprocal compensation.

Section 11.4 of the "Additional Services Attachment" to the 2003 ICA sets forth parties' agreement with respect to Growth Caps for 2003. Pac-West and Verizon agree that the total 2003 Growth Cap is 4.676 billion minutes. The 4.676 billion minutes represents the target level against which actual traffic is

measured to determine the point at which reciprocal compensation is replaced with bill-and-keep. Parties disagree concerning the point at which to begin counting the minutes of traffic subject to the 2003 Growth Cap. Specifically, parties dispute whether traffic subject to the Growth Cap should be counted beginning on January 1, 2003, versus May 23, 2003, the date when the ICA took effect.

Because the 2003 ICA did not take effect until May 23, 2003, Pac-West believes it is improper to include traffic exchanged prior to that date in determining when the 2003 Growth Cap was reached. Pac-West claims that traffic exchanged prior to May 23, 2003 was subject to the terms of a prior ICA, and thus has no applicability in the calculation of the traffic subject to the Growth Cap under the May 23, 2003 ICA.

Accordingly, Pac-West argues that Verizon must *exclude* traffic exchanged from January 1 through May 23, 2003, in calculating when the Growth Cap is reached for Calendar Year 2003. Verizon disagrees, arguing that the proper starting point is January 1, 2003, for purposes of counting traffic subject to the 2003 Growth Cap for reciprocal compensation under the May 23, 2003 ICA.

The result of counting traffic starting from January 1, 2003 (instead of May 23, 2003), is that the 2003 Growth Cap is reached sooner. Pac-West would thus receive less reciprocal compensation since traffic exchanged after the Growth Cap is reached is subject only to bill-and-keep treatment. If traffic exchanged from January 1, 2003 is *included*, then the Growth Cap was reached in late July 2003. If traffic exchanged prior to May 23, 2003 is *excluded*, then the Growth cap was not reached until the fall of 2003.

As a basis for its interpretation, Verizon relies on Section 11.4.2 of the ICA which states that "each Party's compensation for ISP-Bound traffic shall be

capped on a calendar year basis…" Verizon interprets this clause to mean that the allowable minutes subject to the 2003 Growth Cap must incorporate actual traffic exchanged during the calendar year beginning January 1, 2003.

Pac-West does not dispute that the ICA calls for the 2003 Growth Cap to be calculated "on a calendar year basis." Pac-West interprets the calendar year provision, however, as applying merely to that portion of the calendar year that the ICA was actually in effect. For 2003, Pac-West interprets the calendar year basis to cover only data exchanged after May 23, 2003, i.e., the portion of the calendar year that the ICA was in effect. According to Pac-West, the inclusion of data earlier than May 23, 2003 in the determining the level of capped compensation for 2003 would constitute impermissible retroactive implementation of the *FCC Internet Order*. Pac-West thus argues that traffic exchanged prior to May 23, 2003 is subject to the prior 1996 ICA, and as such, cannot count toward the 2003 Growth Cap under the new ICA.

2. Discussion

The focus of the parties' disagreement concerns the interpretation of the "calendar-year basis" for capping the traffic subject to reciprocal compensation for 2003. We disagree with Pac-West's interpretation on this issue.

It is true that the traffic exchanged prior to May 23, 2003 was not defined as ISP-bound traffic for purposes of determining the reciprocal compensation under the 1996 ICA. Moreover, rates paid under the 2003 ICA were to be applied on a prospective basis. Nonetheless, neither of these facts negate the requirement that compensation under the ICA was capped at 4.676 billion minutes of traffic on a "calendar year basis."

Although the ICA was effective on May 23, 2003, the ICA did not prescribe the capping of compensation to be on a *contract year basis*. Instead, the schedule

for computing Growth Caps during the 2001-2003 period set forth in Section 11.4.2 of the ICA provides that "compensation for ISP-Bound Traffic shall be capped" *on a calendar year basis.* A calendar year consists of a 12-month period from January to December. Such a contract provision logically requires the capping of compensation to take into account traffic exchanged during the 12 months of a calendar year.

It is true that Section 11.3.2 provides for compensation for termination of ISP-bound traffic *on a prospective basis.* That compensation is due, however, only on qualifying minutes of traffic. Specifically, Section 11.3.1 provides, "[t]he rates, terms and conditions" in Section 11.3 "apply only to the receipt and handling of presumed ISP-Bound Traffic *subject to the growth caps stated in subsection 11.4 below*." [emphasis added]. Thus, the prospective rates applied effective May 23, 2003 only to the extent that there were compensable minutes subject to capped limits. The caps, in turn, are governed by the "calendar year basis" prescribed for measuring capped minutes of traffic. Thus, although traffic exchanged prior to May 23, 2003 was subject to the terms of the 1996 ICA, it still remained calendar year 2003 traffic data.

Viewed in this manner, recognizing calendar year 2003 data as prescribed in the ICA does not retroactively implement the *FCC Internet Order* earlier than May 23, 2003. Such calendar year data merely calibrates the proper starting point for determining the minutes exchanged beginning on May 23, 2003 that qualify for compensation under the 2003 Growth Cap.

In computing the capped level of compensation, therefore, the "calendar year basis," as a time frame, should apply consistently both to the authorized cap of 4.676 billion minutes, and to the actual minutes applied against that cap. The ICA does not permit one time frame for counting actual minutes and another for

the authorized minutes, but instead merely requires that the capping must be "on a calendar year basis."

Pac-West starts counting *actual* minutes only at May 23, 2003, however, while assuming a start date of January 1, 2003 for the allowable 4.676 billion minutes. As a result of this starting date disparity, Verizon would pay capped compensation on 7.5 billion minutes for calendar year 2003, even though the 2003 Growth Cap is limited to only 4.676 billion minutes. To be consistent, using Pac-West's own "calendar year basis" interpretation, if only actual minutes subsequent to May 23, 2003 applies under the new ICA, then likewise, only that portion of the 4.676 billion allowable capped minutes attributable to the post-May 23, 2003 period, should likewise apply under the ICA.

Pac-West argues, however, that Verizon failed to include any "prorating provision" with respect to either the 2003 or 2004 Growth Cap. Yet, there is also no explicit "prorating provision" in the ICA limiting actual calendar year minutes only to that fraction attributable to the post-May 23, 2003 period. A reasonable interpretation is that consistent counting protocols should apply both to the actual and allowable minutes for purposes of the 2003 Growth Cap.

Consistent with the ICA requirement to implement the capping of 2003 reciprocal compensation on a "calendar year" basis, we therefore conclude that Verizon's interpretation on Issue 1 is the correct one.

B. Issue 2: Does UNE-P Traffic Originated by Third-Party Local Exchange Carriers Qualify for Inclusion in Determining When the 2003 Growth Cap Was Reached?

1. Background

Under the *FCC Internet Order*, traffic that exceeds a 3:1 terminating-to-originating ratio is presumed to be ISP-bound traffic subject to the FCC's

transitional compensation mechanism. In measuring traffic subject to the 3:1 ratio, Verizon includes traffic originated not only by its own retail customers, but also that originated by customers of competitive local exchange carriers (CLECs) utilizing the unbundled network element platform (UNE-P) leased from Verizon. Pac-West argues that it is improper for Verizon to include UNE-P traffic in determining the 3:1 ratio. Pac-West believes that because UNE-P traffic is not originated by retail customers of Verizon, such traffic should not be included.

Pac-West claims harm in two ways by inclusion of UNE-P traffic in the 3:1 ratio calculation. First, as between itself and those CLECs, Pac-West believes it would be entitled to compensation for termination of traffic to the extent that the 3-to-1 ratio was not exceeded. Second, Pac-West believes it would be entitled to more compensation from Verizon if UNE-P traffic is excluded in computing when the Growth Cap is reached. This is because UNE-P traffic increases the cumulative minutes applied to the Growth Cap, causing the Growth Cap to be triggered sooner. Consequently, more traffic minutes are treated as being in excess of the cap, and thus not eligible for reciprocal compensation.

Pac-West thus seeks findings that:

1. Verizon may not include traffic originated on UNE-P facilities provided by Verizon to third-party LECs in calculating whether Pac-West has reach the Growth Cap applicable to Calendar Year 2003;

2. Verizon must provide Pac-West the "Calling Party Number" (CPN) and "Originating Carrier Number" (OCN) data for all such traffic; and

3. Verizon must remit to Pac-West the termination charges that Verizon has collected which were applicable to services provided by Pac-West.

Verizon denies that anything in the FCC's rules or the ICA prohibits inclusion of UNE-P traffic in calculating the 3:1 ratio. Verizon further claims that the FCC's Wireline Competition Bureau (Bureau) has ruled that traffic originated from ILEC-provided UNE-P services is properly included in the calculation of the 3-to-1 ratio under the FCC Internet Order. Verizon quotes from an Arbitration Order of the Bureau which found that the FCC Internet Order "does not distinguish between UNE-platform traffic and originating interconnection trunk traffic in its application of the 3:1 ratio" and "conclude[d] that both categories of traffic should be included in this calculation."[1]

Verizon also denies that any provision in the ICA requires Verizon to provide billing, originating carrier, or any other information that might allow it to determine how much UNE-P traffic Verizon sends to Pac-West. Verizon further denies that Pac-West would have received additional compensation from Verizon even assuming that UNE-P minutes were to be excluded from the 2003 Growth Cap calculation.[2]

Pac-West takes issue with Verizon's calculations that are intended to demonstrate that no additional liability would result even assuming the inclusion of UNE-P traffic in the calculation. Pac-West characterizes Verizon's

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[1] In re Petition of WorldCom, Inc., Memorandum and Opinion, Docket Nos. CC 218, CC 249, CC 251, DA-02-1731 (released July 17, 2002) at ¶ 267 (Virginia Arbitration Order).

[2] In support of this claim, Verizon provided certain proprietary data, for which it filed a motion for leave to file such confidential materials under seal. No party objected to the motion to file confidential materials under seal. Accordingly, Verizon's motion to file such materials under seal is granted.

calculations as confusing, erroneous, and ignoring potential revenue that Pac-West could have obtained from third-party UNE-P carriers.

Pac-West presented SBC data for illustrative purposes as to the growth of SBC access lines converted to UNE-P lines in the year prior to March 2003. SBC access lines converted to UNE-P increased from approximately 100,000 to over 900,000 during this period. [3] Pac-West believes that this data illustrates the magnitude of growth for Verizon UNE-P lines. Pac-West claims, on this basis, that UNE-P traffic volumes are material and impact the level of compensation due from Verizon.

2. Discussion

The ICA does not address explicitly whether UNE-P traffic is to be included in the count of traffic subject to the 3:1 ratio in the ISP Order. In support of its position, Pac-West points to the definition of "Tandem Transit Traffic" in Section 15.1 of the Interconnection Attachment. This definition references traffic originating on Pac-West's network and transported through a Verizon Tandem to the central office of a third-party carrier "that subtends the relevant Verizon Tandem to which Pac-West delivers such traffic." According to the Section 15.1 definition, neither the originating nor terminating customer in such an arrangement is a customer of Verizon.

Although Section 15.1 describes a different configuration than that involving UNE-P traffic, Pac-West argues that the same broad principle should apply, namely, that customers of third-party UNE-P carriers are not Verizon customers, nor is such traffic that of Verizon's. Verizon disputes the relevance of

[3] The cited source of this data is a chart provided in SBC's notice of Ex Parte Communication filed May 3, 2003, page 11, in A. 01-02-024.

Section 15.1, arguing that it involves a separate provision having nothing to do with UNE-P CLECs, which do not subtend any tandems.

We conclude that while Section 15.1 does not specifically address UNE-P arrangements, it does suggest the more general principle that originating traffic should be attributed to the carrier that originated it. Thus, when Pac-West terminates a call originating from UNE-P facilities, it is not terminating a call originated by a retail customer of Verizon. The originating traffic belongs to the UNE-P carrier. As such, any reciprocal compensation due for such traffic is appropriately collected from the UNE-P carrier, not from Verizon.[4] Thus, because Verizon is not the appropriate carrier to pay reciprocal compensation on such calls originated from UNE-P carrier, the traffic minutes for such UNE-P calls are properly excluded in measuring applicable minutes subject to the Growth Cap.

As a basis for claiming that UNE-P traffic should be included as Verizon-originated traffic in counting towards the 3:1 ratio, Verizon cites the FCC Arbitration Order, referred to as the Virginia Arbitration Order. Pac-West argues, however, that given its different set of facts, the Virginia Arbitration has limited, if any, relevance to the issues here. To the extent that the Virginia

[4] Similarly, despite providing the underlying wholesale facilities, Verizon does not collect originating and terminating access charges from long distance carriers originating or terminating calls from the customers involved. This is because Verizon is not the provider of the access services provided by the UNE-P carrier through use of the Verizon facilities. Likewise, with respect to local exchange service, it is the UNE-P carrier that pays into the Universal Service Fund, and similar funding programs. Thus, it is the UNE-P carrier—not Verizon—that originates calls that are terminated by Pac-West, and that is responsible for paying any reciprocal compensation due on such calls.

Arbitration Order has relevance, Pac-West believes that it supports the position that UNE-P traffic should not be included by Verizon in calculating the 3:1 ratio.

In the Virginia Arbitration Order, the traffic at issue originated on the CLEC network (i.e., that of WorldCom), rather than the ILEC network. WorldCom, in that proceeding, claimed that any traffic it originated utilizing UNE-P lines should be combined with its own non-UNE-P traffic in computing the 3:1 ratio to determine the presumed level of ISP-Bound Traffic. The FCC agreed that UNE-P traffic originated by WorldCom should be combined with its non-UNE-P traffic for the purpose of calculating the 3:1 ratio.

In that instance, the same entity (i.e., WorldCom) originated its own traffic from both UNE-P and non-UNE-P sources. As such, it made sense to combine both sources of traffic in computing the 3:1 ratio since both sources originated from the same carrier. By contrast here, Verizon is not the same entity as the UNE-P carrier originating traffic that is terminated by Pac-West. Since there are two distinctly separate carriers originating their own traffic, the 3:1 ratio of originating to terminating traffic should be separately determined with respect to each carrier. Accordingly, UNE-P originated traffic should be excluded from Verizon-originated traffic in the 3:1 ratio calculation made under the ICA.

The Virginia Arbitration Order also addressed the situation where the UNE-P carrier terminates calls that originate from a third party. The FCC agreed in that instance that a UNE-P carrier must bill the originating carrier directly. The FCC concluded that such an arrangement was consistent with Section 251(b)(5) of the Act, that requires all LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications."

A similar principle applies here, although the specific direction of the traffic flow is reversed. The dispute here involves carriers utilizing Verizon

UNE-P facilities whose customers originate calls that are terminated by a Pac-West customer. Consistent with the reasoning in the Virginia Arbitration Order, such calls should be attributed as originating from customers of the UNE-P carrier. Verizon customers are not originating the call. Verizon merely leases the UNE-P facilities to another carrier. Moreover, the terminating carrier, Pac-West, is entitled to seek compensation from the originating UNE-P carrier.

Accordingly, Issue 2 is decided in favor of Pac-West. Thus, the UNE-P traffic should not be counted as Verizon originated in computing the 3:1 ratio, but treated as originating from the LEC acquiring the UNE-P facilities from Verizon.

In order to determine the applicable UNE-P traffic to be excluded, Pac-West believes that Verizon must provide the list of access lines constituting UNE-P which originated traffic to a Pac-West NPA-NXX[5] during each month of 2003 and 2004, and the minutes of use by NPA-NXX for each such UNE-P line by month. Pac-West seeks this information in order to make the determination of the effect of removing such UNE-P traffic from the calculation of the 2003 Growth Cap.

Verizon argues that the Commission cannot entertain Pac-West's request to furnish the requested lists of UNE-P access lines and minutes of use for 2003 and 2004 because Pac-West's Motion did not present this request as a separate issue for dispute resolution. Verizon argues that this question must first be

[5] NPA-NXX is the term used to identify the rate center location to which a given call was terminated. "NPA" refers to the designated "Numbering Plan Area" or area code, and "NXX" refers to the three-digit central office code prefix identifying the rate center for the terminated call.

negotiated between the parties as to whether the ICA requires Verizon to provide Pac-West with such information. Verizon thus claims this issue is not ripe for consideration because Pac-West has not attempted dispute resolution nor made any showing that it has done so. Verizon further claims that nothing in the ICA requires either party to provide billing records or other information about UNE-P traffic.

We disagree with Verizon's claim that this issue is not ripe for resolution because Pac-West did not separately identify the data requirement as a discrete issue in its motion. In its original motion, in discussing Issue 2, Pac-West specifically claimed: "Pursuant to Section 12.5 of the Network Elements Attachment to the Agreement, Verizon is obligated to provide Pac-West sufficient data, such as calling party number, to permit Pac-West to invoice the originating carrier for call termination services." (Motion at 14) Also, Pac-West argued: "Verizon should be required to provide the necessary billing information by implementing the necessary procedures and interconnections with third party carriers from which it accepts UNE-P traffic…" (Motion at 15).

Verizon thus had notice of the issue regarding production of UNE-P traffic data as an element of Issue 2 when, in its response to the Motion, Verizon agreed to bypass mediation in order to obtain an ALJ ruling. Thus, we are unpersuaded by Verizon's objection that the issue is not ripe for resolution in this Ruling.

With respect to provisions in the ICA requiring production of UNE-P data, Pac-West cites Section 10.2 which provides:

> "Where either Party is performing a transiting function, the transiting Party will include the original and true CPN and Originating Carrier Number ("OCN") as part of the call records provided to the receiving Party if it is received from the originating third party."

Pac-West claims that this Section references precisely the data required for Pac-West to invoice third-party LECs for UNE-P-based traffic deliveries, and that no additional contract provision is required to compel Verizon to provide such data. Pac-West characterizes Verizon's role as that of a transit carrier, as referenced in Section 10.2 of the ICA, when Verizon handles UNE-P traffic of the third-party LEC, forming the physical connection between that LEC's network and the point of interconnection with the Pac-West network.

We conclude that Verizon is required to comply with the contractual requirement to "include the original and true CPN and Originating Carrier Number ("OCN") as part of the call records provided to the receiving Party if it is received from the originating third party," as specified in Section 10.2, cited above. Pac-West has also asked for the minutes of use by NPA-NXX for each such UNE-P line by month. Although the data cited in Section 10.2 does not appear to specifically mention minutes of use, it is reasonable to infer that such data is required to make the necessary calculations relating to the 3:1 ratio.

The data presented by Verizon concerning UNE-P lines does not appear to be sufficient to confirm whether or to what extent UNE-P usage data would change the amount of compensation due Pac-West. Verizon's assumptions are questionable, in particular, that (1) July 2004 UNE-P lines in service are representative of 2003, and that (2) UNE-P lines making ISP-Bound Calls have the same average holding time as all Verizon lines. It is UNE-P minutes of use, not the number of UNE-P lines, that affects when Pac-West is alleged to have reached the 2003 Growth Cap. Accordingly, Verizon should provide the data requested by Pac-West.

C. Issue 3: Does the 2003 ICA Establish Any Growth Cap for Calendar Year 2004?

1. Background

Parties disagree concerning whether the Growth Cap in effect for 2003 continued to be in effect during 2004. Pac-West denies any Growth Cap provision exists applicable to 2004, either in the ICA or in the *FCC Internet Order*. Pac-West argues that Section 11.4 is the sole provision of the ICA establishing a cap on the number of minutes of terminated traffic for which compensation is payable, and that there is no provision therein for such a cap beyond the year 2003.

Although there is no such explicit provision in the ICA setting forth a cap for the year 2004, the question is whether a cap provision for 2004 may be inferred through the language of the *FCC Internet Order*. Section 9.1 of the ICA provides that the parties' rights and obligations with respect to compensation for ISP-Bound Traffic are governed by the *FCC Internet Order*.

Pac-West denies, however, that there is any directive in the *FCC Internet Order* calling for a 2004 Growth Cap. Pac-West references Paragraph 78 of the *FCC Internet Order* as the relevant language where Growth Caps are addressed. Pac-West argues that there is no reference to 2004 (or any later year) in Paragraph 78, nor any language elsewhere in the *Order* indicating that the 2003 Growth Cap would remain in effect under any circumstance. Pac-West also attaches, as Exhibit C, an arbitrator's ruling from the State of Oregon, interpreting the ISP Remand Order as not imposing any continuation of the Growth Cap beyond 2003.

Since the filing of Pac-West's Motion, the FCC has issued its decision in the Core Communications proceeding (CoreCom Order) which determined that the

public interest is not served by continuation of any Growth Caps prospectively. In view of the CoreCom Order, Verizon agrees with Pac-West that as of October 8, 2004 (the effective date of the CoreCom Order), there is no effective Growth Cap on a prospective basis. Thus, the dispute between the parties involves whether a Growth Cap was in effect for 2004 up until the October 8, 2004.

Verizon contends that although the FCC did not specifically define a Growth Cap beyond 2003, there was no need to do so because the FCC expected that the 2001-2003 period would "afford .. the Commission adequate time" to consider comprehensive reform of intercarrier compensation. (Internet Order at ¶ 83). Verizon argues that the last stage of the transitional regime was intended by the FCC to continue "until further Commission action" in the event it had not adopted a permanent intercarrier compensation mechanism at the end of the three year period. (Internet Order at ¶ 8). Verizon thus believes that a Growth Cap applied for 2004 up until October 8, 2004, and claims that Pac-West reached the 2004 Growth Cap in mid-July 2004. Verizon has not paid reciprocal compensation for the termination of traffic after mid-July 2004 based on its belief that a 2004 Growth Cap applied to such traffic.

Verizon recites ICA language stating that the rate applicable during the period June 14, 2003 through "June 13, 2004 or until further FCC action" would be the third-phase rate of $0.0007 per minute of use; and that such rate "is subject to the growth caps." (Interconnection Attachment §§ 11.3, 11.3.2). Based on this language, Verizon argues that the contract contemplated as compensation rate for 2004 that was subject to the growth caps.

Verizon argues that the FCC intended that both the rate and volume caps to work in tandem, and that both were necessary to curb regulatory arbitrage

and smoothly transition to a bill-and-keep system. In support of its position, Verizon makes reference to an order by the Maryland Public Service Commission interpreting the FCC Internet Order, Paragraph 78, to mean that the growth cap applicable to 2003 applied in 2004 and beyond.

2. Discussion

There is agreement that the caps do not apply after October 8, 2004. For the period from January 2004 up through October 8, 2004, no explicit statements are made in either the ICA or the *FCC Internet Order* concerning the applicability of the volume cap. Consequently, we must rely upon indirect statements and inferences drawn from the FCC Orders and the ICA to determine whether a volume cap applied during the disputed period of 2004. Based on such references, we conclude that a Growth Cap continued to apply up until October 8, 2004.

The FCC explains the reason why volume caps explicitly referenced a three-year period, as stated in paragraph 83 of the *FCC Internet Order*:

> "The three-year transition we adopt here ensures that carriers have sufficient time to re-order their business plans and consumer relationships, should they so choose, in light of our tentative conclusions in the companion NPRM that bill and keep is the appropriate long term intercarrier compensation regime."

In Paragraph 86, the FCC further explains:

> "We impose an overall cap on ISP-bound minutes for which compensation is due in order to ensure that growth in dial-up Internet access does not undermine our efforts to limit intercarrier compensation for this traffic and to begin, subject to the conclusion of the NPRM proceedings, a smooth transition toward a bill-and-keep regime."

Under Pac-West's interpretation, the declining volume of traffic subject to reciprocal compensation could reverse direction and rise without limit beginning in 2004, assuming expiration of the volume caps from 2003. Such an interpretation, however, is inconsistent with the FCC's intention for a "smooth transition toward a bill-and-keep regime." The FCC envisioned the three-year schedule for volume caps as a "36-month transition towards a complete bill and keep recovery mechanism while retaining the ability to an alternative mechanism based upon a more extensive evaluation in the NPRM proceeding." (Paragraph 7.) Pac-West's interpretation is not consistent with the FCC's stated intent of what was to happen at the end of the three year transition period.

In addition, in the Core Com Order, the FCC explained the intent of the volume caps, stating:

> "The [FCC] imposed an overall cap on ISP-bound minutes for which compensation is due in order to ensure that growth in dial-up Internet access would not undermine the Commission's efforts to limit intercarrier compensation for this traffic, and to address intercarrier compensation in a comprehensive and unified manner."

Thus, the stated goal of the FCC was to use the growth caps to prevent continued expansion of what it viewed as the arbitrage opportunity presented by ISP-bound traffic. It pursued this goal by imposing growth caps under a schedule that extended through 2003 in order to curb regulatory arbitrage and smoothly transition to a bill and keep system. We agree that the CoreCom Order provides evidence that the FCC expected for the caps to continue into 2004 assuming no further FCC action had been taken by then.

If the FCC had originally intended for the volume caps to expire automatically on January 1, 2004, then it could have simply said so in the CoreCom Order. It would have been unnecessary to cite industry statistics concerning declining usage of dial-up ISP services, or to conclude, for *that* reason, that Growth Caps were no longer in the public interest. Yet, that is what the FCC did.

Moreover, in Paragraph 3 of the CoreCom Order, the FCC contrasted recent declining dial-up usage statistics with the earlier expectations of growth in dial-up traffic at the time of the *FCC Internet Order*. The FCC sought to prevent continued expansion of what it viewed as the arbitrage opportunity presented by ISP-bound traffic through the Growth Caps. Thus, it was in response to unanticipated trends toward declining dial-up traffic—*not* a preordained cancellation of the caps on January 1, 2004-- that the FCC determined no longer

to enforce the usage cap in the CoreCom Order. Thus, it is logical to infer that the cap continued in effect up until October 8, 2004, when the findings in the CoreCom Order were made. Issue 3 is accordingly decided in favor of Verizon.

IT IS RULED that:

1. The motion of Pac-West Telecomm, Inc. (Pac-West) for a ruling on the three issues presented for resolution is hereby granted to the extent set forth below.

2. The three issues presented by Pac-West for an opinion by ALJ are hereby decided in the following manner, as explained in the discussion above: Issues 1 and 3 are decided in favor of Verizon California, Inc. (Verizon) Issue 2 is decided in favor of Pac-West.

3. The motion of Verizon, is granted for leave to file confidential materials under seal pages 13 and 14 of its opening brief. The confidential materials, as referenced in Verizon's motion, shall remain under seal for a period of two years from the date of this ruling, unless Verizon, files a motion, for good cause to extend the period further. While under seal, the confidential materials shall not be made accessible or disclosed to anyone other than Commission staff except on the further order/ruling of the Commission, the Assigned Administrative Law Judge (ALJ), or the ALJ then designated as the Law and Motion Judge.

Dated February 24, 2005, at San Francisco, California.

/s/ THOMAS R. PULSIFER
Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have this day served the attached Administrative Law Judge's Ruling On Disputed Contract Issues on all parties of record in this proceeding or their attorneys of record by electronic mail to those who provided electronic mail addresses, and by U.S. mail to those who did not provide email addresses.

Dated February 24, 2005, at San Francisco, California.

/s/ JANET V. ALVIAR
Janet V. Alviar

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.